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# Supreme Court of the United States

OCTOBER TERM, 1929

No. 457

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners doing business under the firm name and style of WALKER & DALY,

Petitioners,

—against—

ROBERT CAIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION WITH APPENDIX.

CARVER W. WOLFE,
*Counsel for Petitioners,*
No. 27 William Street,
Borough of Manhattan,
New York City.

Higgins & Higgins, Inc., Printers, 43 New Chambers St., N. Y.

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**SUPREME COURT OF THE UNITED STATES**

**October Term—1929**

No.....

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners, doing business under the firm name and style of WALKER & DALY,
Petitioners,

*—against—*

ROBERT CAIN,
Respondent.

## PETITION FOR WRIT OF CERTIORARI.

*May it Please the Court:*

The petition of ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners doing business under the firm name and style of WALKER & DALY, respectfully shows to this Honorable Court:

### A.

### Summary Statement of the Matter Involved.

The respondent, a seaman on board the pe-

titioners' American Steamship "ALPHA", obtained a judgment in an action at law in the District Court for the Southern District of New York in the sum of Twelve thousand and 00/100 ($12,000.00) Dollars, for injuries alleged to have been sustained by reason of a willful assault committed by the Second Assistant Engineer of the vessel in a moment of anger as a disciplinary measure arising out of the respondent's dereliction in duty. The case was submitted to the jury on the theory that if the assault was committed in the scope of the assaulting officer's employment, and not as a result of a private brawl, the employer would be liable. The Circuit Court of Appeals in an opinion written by Judge Swan, Judges Manton and Augustus N. Hand concurring, affirmed the judgment.

---

**Questions Presented:**

1. Where there is no evidence of breach of the shipowner's duty to protect a seaman from inhuman treatment, no proof of previous vicious character of the assaulting officer, and no ratification of the assault by the shipowner, is the vessel owner liable under the General Maritime Law for indemnity for injury sustained by a seaman resulting from a willful assault of a superior officer other than the master, committed in anger because of the seaman's dereliction from his duty?

2. Is the so-called Corporal Punishment Statute, Sec. 712, Title 46, U. S. C., R. S. §4611; December 21, 1898, c. 28, §22, 30 Stat. 761; Mar. 4, 1915, c. 153, §9, 38 Stat. 1167, exclusively definitive as to the shipowner's liability for a willful assault committed upon seamen by a superior officer other than the master as a disciplinary measure where there is no evidence of breach of the owner's duty to protect seamen from inhuman treatment, no proof of previous vicious character of the assaulting officer, and no ratification of the assault by the owner?

3. Where the evidence shows that an assault was committed upon a seaman by an officer other than the master in anger because of the seaman's dereliction in his duty, can the assault be regarded as having been committed in furtherance of the shipowner's business?

## B.

## Reasons Relied on for the Allowance of the Writ.

1. This Court has never directly passed on the question of a shipowner's liability for willful assault committed by an officer other than the master upon a member of the crew where there is no evidence of breach of the owner's duty to protect seamen from inhuman treatment,

no proof of previous vicious character of the assaulting officer, and no ratification of the assault by the owner. The Circuit Court of Appeals, although it considered the authorities decided the question as though it were presented *de novo*, but stated in its opinion "that the question is not free from doubt." It is, therefore, vitally important to shipowners and seamen alike, that the opinion below should be reviewed upon by this Court.

2. The opinion of the Circuit Court of Appeals is in conflict with the implications contained in the decision of this Court in *The Osceola*, 189 U. S. 158, and *Davis vs. Green*, 260 U. S. 349. It is also in conflict with *Gabrielson vs. Waydell*, 135 N. Y. 1, and *Encarnacion vs. Jamison*, 251 N. Y. 218, 1929, A. M. C. 1239, in which a petition for a writ of certiorari has been applied for.

3. The application and construction of the Corporal Punishment Statute, §712, Title 46, U. S. C. A., R. S. §4611; Dec. 21, 1898, c. 28, §22, 30 Stat. 761; Mar. 4, 1915, c. 153, §9, 38 Stat. 1167, has not been considered by this Court, particularly as to whether it furnishes an exclusive basis for liability of a shipowner for willful assault committed by one other than the master. The opinion below disregarded its plain meaning.

4. The Circuit Court of Appeals misconstrued the decision of this Court in *Davis vs. Green supra*, and *The Osceola, supra*, concern-

ing the applicability of the rule respondeat superior.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case, and that the said judgment of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem to be just,

AND your petitioners will forever pray.

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners doing business under the firm name and style of WALKER AND DALY.

*By*
CARVER W. WOLFE,
*their Solicitor and Counsel.*

SUPREME COURT OF THE UNITED STATES

October Term—1929

No.....

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners, doing business under the firm name and style of WALKER & DALY,
Petitioners,

—*against*—

ROBERT CAIN,
Respondent.

# BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## I.

## Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Second Circuit, as yet unofficially reported, was handed down on the 19th day of August, 1929. It appears appended to the record and as an Appendix to this brief.

## II.

### Jurisdiction.

1. Jurisdiction is founded on Title 28, §41, sub. §1-3, U. S. C., R. S. §563, paragraphs 8 and 9, §629, paragraph 6; Mar. 3, 1875, c. 137, §1, 18 Stat. 470; Mar. 3, 1887, c. 373, §1, 24 Stat. 552; Aug. 13, 1888, c. 866, §1, 25 Stat. 433; Mar. 3, 1911, c. 231, §24, paragraph 3, 36 Stat. 1091; Oct. 6, 1917, c. 97, §1, 40 Stat. 395; June 10, 1922, c. 216, §1, 42 Stat. 634.

2. The date of the judgment to be reviewed is August 27th, 1929.

## III.

### Statement of the Case.

Respondent recovered a judgment in the sum of Twelve thousand and 00/100 ($12,000.00) Dollars, against petitioners in the United States District Court for the Southern District of New York, in an action at law, alleging a willful assault by the Second Assistant Engineer of the petitioners' American Steamship "ALPHA", while said vessel was lying in the navigable waters of the Republic of Venezuela, committed in a moment of anger as a disciplinary measure occasioned by the respondent's lateness in coming

on watch (fols. 11-14). His testimony as to the assault is as follows:

> "He (referring to the Second Assistant) came all the way up and spoke to me and he said 'what to do with you.'
>
> "Q. That means 'What is the matter', is that right? A. I don't know what is the matter with him, I wanted to know what is the matter with the first engineer, the first assistant. That is what I said to him. I said to him, 'I don't know what is the matter with me, what is the matter with the first assistant.' He told me I was a bit late. I says to him 'Yes, I am a bit late, I overslept,' and he said 'Late be damned', and he says to me, and he struck me across the head with a monkey wrench. I fell back like this (indicating) and as I fell back like that, he tapped me over the eye with the monkey wrench. I fell again, right on the deck, and then I got up and I run on my hands and knees away from him" (fols. 137-140).

There was no proof that the engineer involved had a known or notorious, vicious or brutal character. No evidence was offered to show that the assault was committed in the presence of the master, or with his knowledge, consent or ratification, and no evidence showing any breach of the shipowner's duty of protecting the seamen from inhuman treatment.

The case was submitted to the jury on two

theories, first, liability on the basis of respondeat superior, and, secondly, on the basis of the failure of the shipowner to protect the seaman (fols. 1345-1354). The jury disagreed on the second count (fol. 1416 and following) and respondent's counsel has apparently waived any rights which may arise under the second count. Proper exceptions were taken to Trial Court's denial of motion to dismiss the complaint (fols. 534 and following, 1206).

The Circuit Court of Appeals for the Second Circuit affirmed the judgment, predicating liability of the owner on the doctrine of respondeat superior.

## IV.

### Specifications of Errors.

1. The Circuit Court of Appeals erred in finding and holding that the respondent was entitled to indemnity as distinguished from maintainence and cure for injuries sustained by willful assault of a superior officer other than the master, under the General Maritime Law.

2. The Circuit Court of Appeals erred in finding and holding that the so-called Corporal Punishment Statute did not exclusively define the liability of a vessel owner for a willful assault committed by a superior officer other than the master upon a seaman.

3. The Circuit Court of Appeals erred in

holding and finding that the assault was committed in the furtherance of the shipowner's business.

## V.

## ARGUMENT

### Summary of Argument.

### POINT A.

**The opinion below is contrary to, and in conflict with prior Federal and State Court decisions.**

### POINT B.

**The opinion below improperly construed the so-called Corporal Punishment Statute, §712, Title 46, U. S. C. A., R. S. §4611; Dec. 21, 1898, c. 28, §22, 30 Stat. 761; Mar. 4, 1915, c. 153, §9, 38 Stat. 1167.**

### POINT C.

**Even assuming the doctrine of respondeat superior is applicable under the general Maritime Law in cases involving personal injuries, the circumstances under which the assault occurred are such as to bring the case within the rule laid down in Davis vs. Green, 260 U. S. 349.**

## POINT A.

**The opinion below is contrary to, and in conflict with prior Federal and State Court decisions.**

The opinion below laid down the general proposition:

> "While we recognize the question is not free from doubt, we hold that the shipowner is liable for the willful assault of a subordinate officer acting as such in the ship's business."

*The Osceola*, 189 U. S. 158, the leading case governing the shipowner's liability for personal injuries to seamen under the General Maritime Law, in the course of its comprehensive discussion of the subject, held with reference to assault:

> "Beyond this, however, we find nothing in the English law to indicate that a ship or its owners are liable for an indemnity for injuries received by negligence or otherwise in the service of the ship. None such is given in the Admiralty Court Jurisdiction Act of 1861, al-

though it seems an action in admiralty will lie against the master *in personam* for an assault committed upon a passenger or seaman. *The Agincourt*, 1 Hagg. Adm. 271; *The Lowther Castle*, 1 Hagg. Adm. 384. This feature of the law we have ourselves adopted in General Admiralty Rule 16, declaring that 'in all suits for assaults or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only' " (p. 171).

It laid down the further propositions:

"1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, by both English and American Law, liable for an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship. (*Scarf vs. Metcalf*, 107 N. Y. 211, 13 N. E. 796).

3. That all members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

The Circuit Court of Appeals, considering the effect of *The Osceola* decision, *supra*, held as follows:

"Having thus directed its attention to injuries resulting from assaults, it would seem strange for the Court, had it thought an action *in personam* would lie against the owners, to have ignored this remedy and to have specified only that against the master. Nevertheless the propositions laid down in *The Osceola* opinion cannot be deemed an absolutely complete statement of an injured seaman's rights against his vessel and her owners in view of the later decision in

*The Iroquois,* 194 U. S. 240." (Page 31, Appendix.)

Now, it is obvious that *The Osceola, supra,* is not a complete statement of the rights and liabilities of shipowners in all conceivable conditions. But the law laid down in *The Osceola, supra,* is a complete statement of the rights and liabilities of seamen, vessel, and owner for injuries sustained in the navigation of the vessel. For injuries resulting to seamen from a violation of the owner's contractual duty to furnish proper food, medicines, medical treatment, etc., such as in *The Iroquois,* 194 U. S. 240, of course, the owner is liable for indemnity under the General Maritime Law. It is apparent, therefore, that the rules laid down in *The Osceola, supra,* govern the instant case and that an action for indemnity will not lie.

If we assume with the Circuit Court of Appeals that *The Osceola, supra,* is not specifically applicable, the question remains open for consideration to what extent the decision is controlling in respect of the applicability of the doctrine respondeat superior. In the third proposition in *The Osceola,* this Court held that all members of the crew, except perhaps the master, are fellow-servants. If the assaulting engineer and the respondent were fellow-servants, how can the doctrine of respondeat superior apply?

In *Gabrielson vs. Waydell,* 135 N. Y. 1, the Court of Appeals of New York State held that under the General Maritime Law the vessel

owner was not responsible for indemnity for injuries resulting from an assault committed by the master on the ground that the doctrine respondeat superior did not apply. The case is clearly wrong so far as an assault committed by the master is concerned and was so recognized by the Court of Appeals in its latest decision on the subject, *Encarnacion vs. Jamison*, 251 N. Y. 218. In this latter case, however, the Court in discussing its earlier decision held:

> "While it may no longer be regarded as authority for the proposition of general maritime law that the misconduct of the captain of a ship in his care of the seamen under him is a risk assumed by the seamen, for the consequences of which the owners are not responsible, *Gabrielson vs. Waydell*, 67 Fed. 342; *Osceola*, 189 U. S. 158, 175, there remains in it a vestigial remnant of the once all-comprehensive fellow servant rule, which was in its fullest glory in the year 1892, to wit, the rule of non-liability of the employer for assaults committed by a superior employee upon his inferior in the performance of the employer's work. To this extent it may be controlling upon this Court if it remains in harmony with recent legislation on the subject."

It was thereupon concluded that the Federal Employers' Liability Act, April 22, 1908, 35 Stat.

c. 149, made applicable to seamen by the Merchant Marine Act of June 5th, 1920, 41 Stat. c. 250, U. S. C., Title 46, §688, had changed the Maritime Law and that the Act comprehended willful as well as negligent torts. The Court below disagreed with the State Court of Appeals, holding:

> "While the plaintiff's cause of action cannot, in our opinion, be rested upon the *Jones Act*, (compare *Encarnacion vs. Jamison*), which by incorporating the Federal Employers' Liability Act, requires negligence as the foundation of liability, (*Chesapeak and Ohio Ry. Co. vs. Stapleton*, U. S. Sup. Ct. May 27, 1929), the Statutes may appropriately be referred to as showing the legislative tendency already mentioned." (Page 35, Appendix.)

Hence, if the Circuit Court of Appeals is correct holding that the *Jones Act* is not applied to willful torts, then *Gabrielson vs. Waydell, supra*, is still the law in so far as willful assaults by an officer other than the master is concerned and there is no liability for indemnity.

The authorities which were considered by the Circuit Court of Appeals were rightly disregarded by it as having been inadequately considered. On principle, we can find no justification for distinguishing between liability for willful torts and liability for negligent torts. *The*

*Osceola* definitely set at rest the inharmony of decisions prior to it. The Circuit Court of Appeals has now re-established to a certain extent the pre-existing confusion, in our opinion, *contra* to those propositions laid down in *The Osceola.*

It is significant in considering the instant case on principle, that in none of the early cases appearing prior to *Spencer vs. Kelly,* 32 Fed. 838, was the suit brought against the shipowner. Subsequent to that time only three cases involving an assault committed by one other than the master have come to the attention of the courts. *The General Rucker,* 35 Fed. 152, D. C. W. D., Tenn., Memphis, and *Newport Packet Company vs. Hill,* 122 Fed. 246, C. C. A. 8th, where the owner was held liable, and *The Wawalona,* 1925 A. M. C. 552, where the owner was held not liable. With reference to these three cases, the Circuit Court of Appeals held:

> None of them discuss the possibility of the maritime law having a rule different from the common law, or the possible inconsistency between holding the shipowner for willful torts of a subordinate officer and exempting him for the latter's negligent torts." (Page 37, Appendix.)

Being unable to find satisfactory support for its holding, the Court below was compelled to rely on judicial legislation. It frankly recog-

nized, at least by implication, its decision as such, for it held:

> "The Maritime Law, no less than the common law, is not incapable of growth by judicial decision. Changes in conditions under which commercial shipping is conducted, as well as changes in economic notions, of where loss suffered in the course of a business should fall, should be reflected in the action of the courts though it result in filling pages which history has left blank." (Page 40, Appendix.)

Sociologically this argument is entitled to great weight, but it should not at this late date be permitted to disturb the unanimity of the Maritime Law, except by Act of Congress.

*Chelentis vs. Luckenbach*, 247 U. S. 372, affords support for the non-applicability of the doctrine of respondeat superior in admiralty. There this Court held the shipowner liable for maintenance and cure only for injuries sustained by the negligence of a subordinate officer, saying:

> "But the Maritime Law imposes upon the shipowner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship." (Page 38, Appendix.)

The Court below considered this as an expres-

sion of the non-applicability of the rule respondeat superior and said:

> "If the Maritime Law does not recognize the principle of respondeat superior as applied to negligent acts of a subordinate officer, it is logically consistent to suppose that it does not recognize it as applied to the willful assaults of such an officer." (Page 38, Appendix.)

In view of *The Osceola*, we think that the "logically consistent" supposition is preferable, and urge that the shipowner should be liable only for maintenance and cure where there is no breach of the shipowner's duty of good treatment.

## POINT B.

**The opinion below improperly construed the so-called Corporal Punishment Statute, §712, Title 46, U. S. C. A., R. S. §4611; Dec. 21, 1898, c. 28, §22, 30 Stat. 761; Mar. 4, 1915, c. 153, §8, 38 Stat. 1167.**

This Statute provides as follows:

> "712. *Corporal punishment.* Flogging and all other forms of corporal punishment are prohibited on board of any

vessel, and no form of corporal punishment on board of any vessel shall be deemed justifiable, and any master or other officer thereof who shall violate the aforesaid provisions of this section, or either thereof, shall be deemed guilty of a misdemeanor, punishable by imprisonment for not less than three months nor more than two years. Whenever any officer other than the master of such vessel shall violate any provision of this section, it shall be the duty of such master to surrender such officer to the proper authorities as soon as practicable, provided he has actual knowledge of the misdemeanor, or complaint thereof is made within three days after reaching port. Any failure on the part of such master to use due diligence to comply herewith, which failure shall result in the escape of such officer, shall render the master or vessel or the owner of the vessel liable in damages for such flogging or corporal punishment to the person illegally punished by such officer. (R. S. §4611; Dec. 21, 1898, c. 28, §22, 30 Stat. 761; Mar. 4, 1915, c. 153, §9, 38 Stat. 1167)."

On this feature the opinion of the Court below was:

"The Statute creates a new ground of liability against the master, and the dec-

laration that ship or owner are also liable may have been inserted to preclude the contrary inference which might have been drawn had the master's liability alone been mentioned." (Page 41, Appendix.)

We think this is a strained construction of the Act. If, as the opinion below indicates, the shipowner is already under an existing liability under the doctrine respondeat superior, where an assault is committed by one other than the master, then so much of this Statute as imposes liability on the shipowner is a mere useless gesture. If any speculation as to why Congress inserted a provision making the owner or vessel liable is to be indulged in, it would seem to be the reverse of that drawn by the Circuit Court of Appeals. Certainly the words of the Statute are plain and we think the intention of Congress was to provide a remedy against the owners in view of the previous non-liability under the General Maritime Law. We, therefore, respectfully urge that the Circuit Court of Appeals misconstrued the meaning and effect of the Statute.

## POINT C.

**Even assuming the doctrine of respondeat superior is applicable under the general Maritime Law in cases involving personal injuries, the circumstances under which the assault occurred are such as to bring the case within the rule laid down in Davis vs. Green, 260 U. S. 349.**

The facts in *Davis vs. Green, supra*, taken from the decision of the *Supreme Court of* Mississippi, 125 Miss. 476, are as follows:

Green, the conductor of a train, was in charge of a switch crew, and the engineer was in charge of switching cars from one point in the railroad yard to another point. It was the duty of the conductor to move the switch in the absence of the switchmen. The engineer and the switchman engaged in an altercation as a result of which the switchman left his post. The engineer then proceeded to move his engine along his route and the engineer and conductor engaged in an altercation as to why the conductor had not thrown the switch. The engineer descended from his cab, and, as the Supreme Court of Alabama describes it,

> "with his pistol took his stand in front of the engine and as Green, the conduc-

> tor, and foreman came up accosted him with this remark: 'Why in the hell have you not thrown the switch?' "

The engingeer thereupon shot the conductor. The Supreme Court of Alabama held this act came within the course of the engineer's employment. This Court, speaking through Mr. Justice Holmes in reversing the Supreme Court of Alabama, said:

> "But neither the allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and willful act, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words, that he did a willful act wholly outside the scope of his employment, while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of respondeat superior applies." (pp. 351-352).

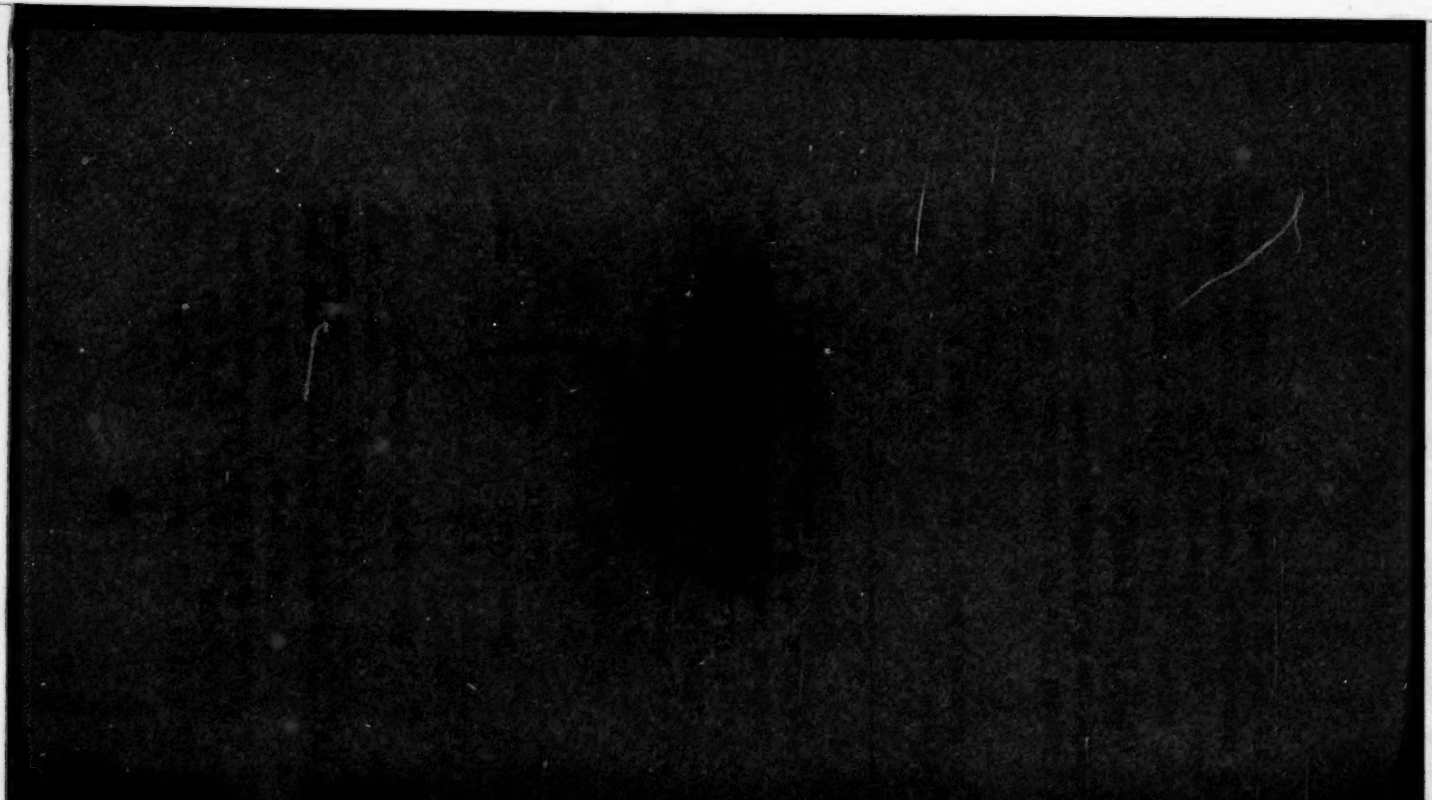
In the instant case, the engineer left his place of employment, the engine room (fols. 219-222), and engaged in an argument over the respond-

ent's coming late on watch, as a result of which the assault occurred. If the assault in *Davis vs. Green* was not in furtherance of the master's business, it seems to us that the assault here was likewise not in furtherance of the master's business. It was as Justice Holmes so aptly remarked: "A willful act wholly outside the scope of his employment while his employment was going on." Hence we respectfully urge that the Court below adopted a mistaken view of the decision.

## CONCLUSION

It Is, Therefore Respectfully Submitted that this case is one calling for the exercise by this Court of supervisory powers, in order that the opinion of the Circuit Court of Appeals may be corrected and the unanimity of the Maritime Law restored, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Second Circuit and finally reverse it.

CARVER W. WOLFE,
*Counsel for Petitioners.*



# APPENDIX

## UNITED STATES CIRCUIT COURT OF APPEALS

### For the Second Circuit

---

Robert Cain,
Plaintiff-Appellee,

*—against—*

Alpha Steamship Corporation, William H. A. Walker and Frank Daly, copartners doing business under the firm name and style of Walker & Daly,
Defendants-Appellants.

---

Before:

Manton, Swan and Augustus N. Hand,
*Circuit Judges.*

Appeal from the District Court of the United States for the Southern District of New York.

Action at law brought by Robert Cain, plaintiff, against Alpha Steamship Corporation, as owner, and Walker and Daly, as operators of a steamship, to recover for personal injuries sustained by plaintiff while employed as a

fireman on said steamship, by reason of an assault committed upon him by his superior officer, the second assistant engineer. Upon verdict of a jury for the sum of $12,000, judgment was entered for plaintiff, and the defendants have appealed. Affirmed.

HATCH AND WOLFE,
*Attorneys for Appellants,*
CARVER W. WOLFE,
*Of Counsel.*

THOMAS J. CUFF,
*Attorney for Appellee,*
VINE H. SMITH,
*Of Counsel.*

SWAN, *Circuit Judge:*

This is an action at law for an assault upon a seaman by a subordinate officer, while both were employed upon an American vessel owned by one of the defendants and operated or controlled by the others. It was committed on shipboard when the vessel lay in a Venezuelan port. Jurisdiction of the District Court is founded upon diverse citizenship. The parties have assumed, and rightly so, that the law applicable to this situation is the general maritime law of the United States. See *Roberts vs. Skolfield,* Fed. Cas. No. 11917; *N. Y. Stevedoring Corp. vs. Castagna,* 280 F. 618, 624 (C. C. A. 2); *Chelentis vs. Luckenbach S. S. Co.,* 247 U. S. 372, 384; *Carlisle Packing Co. vs. Sandanger,* 259 U. S. 255, 259; *Northern Coal Co. vs. Strand,*

178 U. S. 142, 144; compare critical articles in 36 Harv. L. Rev. 777; 21 Columbia L. Rev. 645; 55 Am. L. Rev. 685; 53 Am. L. Rev. 749.

The case was left to the jury upon the theory that if Jackson, the second assistant engineer, actually struck fireman Cain, not in the course of a private brawl but in the exercise of his authority over him as his superior officer, the defendants would be liable. This theory the defendants dispute, contending, first, that it misstates the rule of the maritime law, and, second, that even if the law be as stated, the evidence was insufficient to justify a finding that Jackson was acting within the scope of his authority in striking the blows with which he was charged. Both questions were properly saved for review by exceptions to the Court's denial of motions to dismiss the complaint.

The alleged insufficiency of the facts may conveniently be considered first, for, if that be disposed of favorably to the defendants, it will be unnecessary to determine the more difficult question of law. Cain's testimony is that he started to go down to the engine room some forty minutes late for his watch; that on the first landing of the stairway he met the first assistant engineer and became engaged in an altercation with him concerning his tardiness; that he (Cain) retreated to the top of the stairs and from there saw the first assistant engineer talking to Jackson, who was the officer on duty in the engine room; that the latter

thereupon proceeded up the stairway toward him. Cain claims Jackson was drunk. What happened when Jackson reached the top of the stairs Cain relates as follows:

> "He told me I was a bit late. I says to him, 'Yes, I am a bit late, I overslept', and he said, 'Late be damned', and he says to me, and he struck me across the head with a monkey wrench. I fell back like this (indicating), and as I fell back like that, he tapped me over the eye with the monkey wrench. I fell again, right on the deck, and then I got up and I run on my hands and knees away from him. * * *"

Jackson pursued him, saying "I will teach you to go down on watch, you bastard." Cain ran to the captain and reported that he had been struck by Jackson. The captain however, says that Cain explained later that his wounds were the result of falling on the deck. This was also Jackson's contention. He denied striking any blow whatever. He says the first assistant told him Cain was drunk; that he thereupon went up the stairs to get another fireman; that Cain had his head in the port engine room door and "I hollered to him to come on down". Cain did not obey and Jackson says that by the time he had reached the top of the stairs Cain had fallen down and was getting to his feet and starting to run away. He admits that he followed Cain along the deck, shouting to him to stop.

Without reciting more of the evidence, it will suffice to say that, assuming the law to be as the Court stated it, the evidence raised issues for the jury. Jackson's duty was to get Cain to work, if he thought Cain was able to work. The jury were entitled to find that he approached Cain for that purpose. He himself says "I hollered to him to come on down". They were also entitled to believe Cain's version of what transpired when the two men met at the top of the stairway. Hence they might infer that Jackson gave the blows for the purpose of compelling Cain's immediate attendance and in connection with reprimanding him for his tardiness. Although excessive violence was used, this is not conclusive that Jackson was not acting in the ship's business. The evidence made it a jury question whether he committed the assault as an officer of the ship in an effort to maintain discipline and obtain a full engine room crew for the watch of which he was in charge, or struck the blows in a private brawl. In *Davis vs. Green*, 260 U. S. 349, a very different situation was presented. There the killing of the conductor resulted from the engineer's personal rancor and was not in furtherance of the employer's business. Here we must accept the jury's verdict as a finding that Jackson's blows were not given in a private brawl but in the exercise of his authority as an officer. Hence we must determine the legal question first mentioned.

The rule of the common law, as established

by the weight of modern authority, imposes liability upon an employer for an assault committed by one of his employees upon another, when the latter is in a position of authority and acts within the general scope and line of his employment. *Encarnacion vs. Jamison*, 251 N. Y. 218; *Richard vs. Amoskeag Mfg. Co.*, 79 N. H. 380; *Fleming vs. Tarboro Knitting Mills*, 161 N. C. 436; *Rogahn vs. Moore Mfg. Co.*, 79 Wis. 573; *Jebeles-Colias Confectionery Co. v. Booze*, 181 Ala. 456; *Mechem, Agency*, 2nd ed., sec. 1960, et seq.; annotation in 18 L. R. A. (N. S.) 416; 7 Harv. L. Rev. 383 (for historical review by Prof. Wigmore). The plaintiff asserts that the same principle obtains in the maritime law. This the defendants deny, their contention being that a seaman's rights are exclusively those stated in *The Osceola*, 189 U. S. 158, namely, wages, maintenance and cure, if the seaman falls sick or is wounded in the service of the ship, regardless of the cause of his wounds, and indemnity for injuries received in consequence of unseaworthiness of the ship, or failure to supply and keep in order proper appliances appurtenant thereto. Admittedly, the propositions laid down in the opinion are much broader than were required by the actual decision, which was that a seaman cannot maintain a libel in rem to recover indemnity for personal injuries caused by the negligence of the master of the vessel. But the dicta were a considered exposition of the maritime law after a careful historical review of British and European rules as well as American.

After referring to the fact that British law grants a seaman indemnity for injuries received through unseaworthiness of the vessel, the opinion states on page 171:

> "Beyond this, however, we find nothing in the English law to indicate that a ship or its owners are liable to an indemnity for injuries received by negligence or *otherwise* in the service of the ship. None such is given in the Admiralty Court Jurisdiction Act of 1861, although it seems an action in admiralty will lie against the master in personam for an assault committed upon a passenger or seaman. *The Agincourt*, 1 Hagg. Adm. 271; *The Lowther Castle*, 1 Hagg. Adm. 384. This feature of the law we have ourselves adopted in general admiralty rule 16, declaring that 'in all suits for assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only.'"

Having thus directed its attention to injuries resulting from assaults, it would seem strange for the Court, had it thought an action in personam would lie against the owners, to have ignored this remedy and to have specified only that against the master. Nevertheless, the propositions laid down in *The Osceola* opinion cannot be deemed an absolutely complete statement of an injured seaman's rights against his

vessel and her owners in view of the later decision in *The Iroquois*, 194 U. S. 240. There it was held that for negligent treatment of a seaman after he was injured a right to indemnity existed. Moreover, the appellants concede another exception, namely, the seaman's right to indemnity when the master himself commits the assault. Numerous cases in the lower federal courts, though not with unanimity as to the propriety of a proceeding in rem, have held the ship or her owners liable to indemnify a seaman assaulted by the master, or by another with the master's acquiescence, or by a subordinate of notoriously brutal temper. In the last instance, when the injuries are inflicted by a notoriously brutal officer, liability has been rested upon the duty properly to man the vessel in order to make her seaworthy. *The Rolph*, 299 F. 52 (C. C. A. 8). For cases relating to liability of ship or owner when the assault is committed by the master himself, or by another in his presence, see *The Marion Chilcott*, 95 F. 688 (D. C. N. D. Wash.), *The Lizzie Burrill*, 115 F. 1015 (D. C. Ala.); *The Astral*, 134 F. 1017 (D. C. E. D. Pa.); *The Sallie Ion*, 153 F. 659 (D. C. E. D. Pa.); *The Vueltabajo*, 163 F. 594 (D. C. Ala.); *The David Evans*, 187 F. 775 (C. C. A. 9); *Gabrielson vs. Waydell*, 67 F. 342 (C. C. E. D. N. Y.); *Wolfe vs. Thomas*, 268 F. 464 (C. C. A. 6); see also article in 19 Harv. L. Rev. 418. *Gabrielson vs. Waydell*, 135 N. Y. 1, which held the contrary, is no longer the law of New York. *Encarnacion vs. Jamison, supra.* It is true that this doctrine is of comparatively

recent growth. In *Curtis, Merchant Seaman*, page 339, the learned author says:

> "Whether the shipowner would in any case be liable for the consequential injuries occasioned by excessive punishment of a mariner, by a master, is a point which I have never known to be raised."

On general principles of agency, as they were then understood, he proceeds to argue against liability. Compare, however, the statement, at page 26, that it is part of the obligations implied from the mariner's contract that he "shall be treated with decency and humanity by the master and the officers, and by his shipmates." It is true also that the Supreme Court has never passed upon the question. We believe, however, that the above cases correctly declare the maritime rule that a shipowner is responsible for injuries to a seaman resulting from an unjustifiable assault by the master, or by another with his acquiescence, committed in furtherance of the ship's business. We conclude, therefore, that *The Osceola* cannot be deemed to have laid down a complete statement of an injured seaman's right to indemnity, and that the question of the defendant's liability in the instant case is open to independent consideration.

While conceding that the shipower is bound by an obligation implied from the seaman's contract of employment, to furnish him humane

and decent treatment, the appellants assert that this obligation is violated only when brutality is committed by the master or by another with the master's acquiescence. No case has been cited which extends this theory of liability to the acts of a subordinate officer committed outside the presence of the master. We pass without decision the question whether this theory is necessarily so limited, for it is not upon this theory, but upon the theory of respondeat superior, that the plaintiff relies to sustain his right to recover.

To the theory of respondeat superior the appellants reply that all members of a vessel's crew, except perhaps the master, are fellow servants as between themselves, and that the fellow servant exception to the doctrine of respondeat superior includes willful as well as negligent acts of a fellow employee. The fellow servant defense has almost always been stated as applicable to injuries caused by negligence. Only two cases have been found which discuss its applicability to a willful assault. In *Memphis & Newport Packet Co. vs. Hill*, 122 F. 246 (C. C. A. 8) the contention was rejected. In *Gabrielson vs. Waydell*, 135 N. Y. 1 it prevailed, but as already noted, that case has very recently been overruled, though chiefly upon the ground of subsequent Congressional legislation. *Encarnacion vs. Jamison, supra.* In the absence of compelling authority we see no valid reason to extend the fellow servant exception beyond the field of negligence. Even in its re-

stricted scope it has not escaped criticism, and has by statute frequently been curtailed or abolished. It was abolished in respect to negligent injury of railroad employees engaged in interstate commerce by the Federal Employers' Liability Act (35 Stat. 65), and the benefits of that legislation were by the *Jones Act* extended to seamen who suffer personal injury in the course of their employment (41 Stat. 1007). While the plaintiff's cause of action cannot, in our opinion, be rested upon the *Jones Act* (compare *Encarnacion vs. Jamison*), which by incorporating the Federal Employers' Liability Act requires negligence as the foundation of liability (*Ches. & Oh. Ry. Co. vs. Stapleton*, U. S. Sup. Ct. May 27, 1929), the statutes may appropriately be referred to as showing the legislative tendency already mentioned.

Precise authorities are surprisingly few and unconvincing. *The General Rucker*, 35 F. 152 (D. C. W. D. Tenn.) was a libel in personam against the owner for personal injuries caused by an assault by the mate. The libellant was decreed $100 damages and costs. This case is of little value as a determination of the maritime rule for the Court says (p. 157):

> "It is not at all necessary to consider here the question whether a Court of Admiralty proceeds against the owner of a vessel upon distinct grounds of its own growing out of the peculiar relations that exist as between the owner

and those engaged about navigating a vessel of commerce, in cases like this, or only enforces the ordinary common-law principles of master and servant; for it is conceded by the learned counsel that the defendant is liable on the common law principle, and to that extent certainly; and I find no difficulty in adjudging that this case falls clearly within that principle. * * * But, after all, this case falls, in my judgment, within the Tennessee rule of liability; * * * *"*

*Memphis & Newport Packet Co. vs. Hill,* 122 F. 246 (C. C. A. 8), affirmed the decree entered for libellant in a libel in personam for an assault committed by a deck hand who had been selected by the officer in command of the vessel to act as captain of the watch. The opinion holds that the fellow servant doctrine has no application to a willful assault by one acting as a subordinate officer; it applies the general principles of agency, and cites with approval *The General Rucker, supra.* There is no consideration of the question whether the maritime rule differs from that of the common law.

*The Wawalona,* 1925 A. M. C. 552, an oral opinion by Judge Wolverton, appears to hold that the owner is not liable for an assault committed by the chief officer, but that he himself is.

These three cases are the only ones discov-

ered in which a seaman has attempted to hold the shipowner for an assault committed by a subordinate officer without the acquiescence of the master. None of them discuss the possibility of the maritime law having a rule different from the common law, or the possible inconsistency between holding a shipowner for the willful torts of a subordinate officer and exempting him for the latter's negligent torts.

If the exemption of the shipowner from liability, beyond maintenance and cure, in case of negligent injury to a seaman is to be explained on the fellow servant doctrine, as intimated in *The Osceola,* we should have little difficulty in refusing to extend the doctrine to the case of willful torts committed in furtherance of the ship's business. But *Chelentis vs. Luckenbach S. S. Co.,* 247 U. S. 372, seems to suggest that the exemption is based on a much broader principle. That case was an action at law removed from a state court on the ground of diverse citizenship. Plaintiff, a fireman, sought indemnity from the shipowner for injuries caused by negligence of the second engineer. Recovery beyond maintenance and cure was denied. The Court adopted as the applicable substantive law the maritime rule recognized in *The Osceola.* The most significant point for present purposes is the Court's treatment of Section 20 of the Act of March 4, 1915 (38 Stat. 1164) which provided:

"That in a suit to recover damages

for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority."

If the doctrine of respondeat superior were generally applicable to maritime torts this statute would seem to have destroyed the fellow servant defense and to render the vessel owner liable for negligent injuries caused by a subordinate officer. But the Court held the statute irrelevant, saying:

> "But the Maritime Law imposes upon a shipowner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship. It was of no consequence, therefore, to petitioner whether or not a negligent order came from the fellow servant. The statute is irrelevant."

The implication seems to be that the shipowner's liability does not depend on the rule of respondeat superior but results as an incident of the ownership of the vessel. If the maritime law does not recognize the principle of respondeat superior as applied to negligent acts of a subordinate officer, it is logically consistent to suppose that it does not recognize it as applied to the willful assaults of such an officer. Certain writers on the subject have

enied that the common law rule of respondeat uperior has received general acceptance in the dmiralty. See 19 Harv. L. Rev. 445; 36 Harv. . Rev. 777. Moreover, the appellants urge, can scarcely be deemed without significance at in all the early cases the assaulted seaman ed only the master or the subordinate officer ho committed the assault. *Roberts vs. Skol-eld*, Fed. Cas. No. 11,917; *Anderson vs. Ross*, ed. Cas. No. 361; *Backstack vs. Banks*, Fed. as. No. 711; *Hanson vs. Fowle*, Fed. Cas. No. 042; *Thomas vs. Lane*, Fed. Cas. No. 13902; *Murray vs. White*, 9 F. 562 (D. C. Me.). *Spencer . Kelly*, 32 F. 838 (C. C. N. D. Oh.) was the rst attempt which has come under our observa-on, to hold the owner liable for an assault the master upon a seaman. It reports the urt's charge to the jury, and, so far as ap-ears, the Court charged according to the com-on law rule without considering whether the aritime rule was different. Judge Brown, in *he City of Alexandria*, 17 F. 390 (D. C. S. D. . Y.) recognized the absence of authority as rong evidence that the maritime law did not mpel payment of indemnity for injuries due negligence. Although absence of authority by no means conclusive, it may properly be emed evidence of the general opinion of the rofession.

While not unmindful of the force of the regoing arguments, we remain unconvinced at the maritime rule differs from that of e common law in respect to the liability of e employer for willful torts committed by

a subordinate officer of a vessel acting within the scope and course of his employment. Admittedly the principle of respondeat superior makes liable the shipowner when the assault is upon a passenger. No reason except the fellow servant doctrine has been advanced for its non-applicability when the assault is upon a seaman, and, as already indicated, that doctrine should not be extended to cover willful torts. We do not believe that the dicta of *The Osceola*, or the implications of the *Chelentis* decision, should be pushed beyond the field of negligence, with which those cases dealt. Nor is the absence of early authorities recognizing the shipowner's obligation, sufficient evidence that no such obligation exists. The maritime law, no less than the common law, is not incapable of growth by judicial decision. Changes in conditions under which commercial shipping is conducted, as well as changes in economic notions of where loss suffered in the course of a business should fall, should be reflected in the action of the courts though it result in filling pages with history left blank. Absence of precedent did not preclude recognition by the common law courts of the modern view that a principal should answer for the willful torts of his servant committed in the furtherance of his master's business. The principle is equally applicable to the business of shipping and we find no binding authority which forbids its application in the maritime law. On the contrary, such authority as there is, favors it. In addition to the cases already cited reference

may be made to Hughes, Admiralty, sec. 106, where the author asserts that the owner would be liable "if the assault was made by any of the crew within the course of his employment", and to the views of the author of a scholarly article in 19 Harv. L. Rev. 418. As suggested in the article last mentioned, a law which would excuse the owner when the officer is careful to exercise brutality upon a well seaman, but declares him responsible should the mariner happen to be ill at the time of the assault, could scarcely be deemed satisfactory.

It is urged that the statute which imposes liability upon the master or the ship or her owner in case the master negligently permits the escape of any officer who has inflicted corporal punishment upon a seaman (46 U. S. C. A., sec. 712) indicates that no such liability existed without the statute. To this we cannot accede. The statute creates a new ground of liability against the master, and the declaration that ship or owner are also liable may have been inserted to preclude the contrary inference which might have been drawn had the master's liability alone been mentioned.

While we recognize that the question is not free from doubt, we hold that the shipowner is liable for the willful assault of a subordinate officer acting as such in the ship's business. The denial of the motions to dismiss the complaint was, therefore, not error.

Complaint is made because the Court refused to charge that no subordinate officer has au-

thority to administer discipline without express delegation from the master. As an abstract legal proposition this may be true. *United States vs. Taylor*, Fed. Cas. No. 16,442; *Murray vs. White*, 9 F. 562 (D. C. Me.). But if charged in the form requested it would have been likely to mislead the jury into the belief that the defendants could not be held responsible for Jackson's assault, if they should find he committed one. Obviously a blow with a monkey wrench was not a proper way to administer discipline and the jury had in effect been previously so told. Jackson, as Cain's superior officer, had authority to order him on duty or to reprimand him for being late, and if in connection with such an order or such a reprimand he used physical violence for the purpose of forwarding the ship's business, the owner may be held liable. We do not regard as error the refusal of the requested charge.

The claim that the verdict is excessive was presented to the District Court upon a motion for a new trial. There was no abuse of discretion in denying that motion. The amount of the verdict is not for us to review. See *Romdell vs. Goumis*, 228 F. 864 (C. C. A. 2); *Detroit Taxicab & Trans. Co. vs. Pratt*, 2 F. (2d) 193 (C. C. A. 6); *Bowman-Hicks vs. Robinson*, 11 F. (2d) 240 (C. C. A. 9); *Erie R. R. Co. vs. Winter*, 143 U. S. 60, 75.

The judgment is affirmed.